

forum in which the complainant or respondent can have an opportunity to be heard, confront witnesses, and present evidence so that an administrative law judge can issue a recommended decision that is well-reasoned and justified on the basis of the evidence presented.

The opportunity for a hearing before an ALJ assures more impartiality and the appearance of more impartiality than a decision made by one agency official concerning other officials of the same agency. The Department expects that agency decisions based on a hearing record would more likely survive later judicial review.

Under the regulation, another person or organization would be allowed to participate as a third party or *amicus curiae* if the ALJ determines that the petitioner has a legitimate interest in the proceedings, that participation will not duly delay the outcome, and that petitioner's participation may contribute materially to the disposition of the proceedings.

The Department received comments on the proposed opportunity for a hearing before an administrative law judge. Some commenters were primarily concerned that by invoking a hearing before the ALJ with the procedural safeguards adopted from the Administrative Procedure Act (APA) (5 U.S.C. 554–557), the complainant would lose the right to a *de novo* review of the agency's final decision, because the APA allows a Federal court only to determine if the agency's final decisions are "arbitrary and capricious" (5 U.S.C. 706(2)(A)). It is beyond our jurisdiction to specify that a *de novo* review is available to complaints seeking judicial review of final agency decisions. This issue is for the courts to decide. That is also true for the issue of the availability of a private right of action, either without invoking our compliance procedures or after the issuance of letters of findings.

Given the inherent conflicts of interest in situations where complaints allege discrimination on the part of the Department, it is critically important to ensure that a complaint be reviewed in a fair, independent process. The availability of a hearing before an independent ALJ would provide the appearance as well as the actuality of an impartial compliance mechanism. The Department has therefore included the provision for a hearing in the final regulation.

One comment requested the addition of a provision whereby the Department would award attorneys fees to complainants. Another comment suggested that the Equal Access to Justice Act (5 U.S.C. 504) might provide for the award of fees. Nothing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment. Nor does the

EAJA and the Department's implementing regulations at 28 CFR part 24 provide for such awards in hearings conducted under § 39.170(k). We have therefore included no attorneys fee provision in the current regulations.

Under paragraph (1), the CAO renders a final agency decision after appeal without a hearing or after a hearing. The CAO directs appropriate remedial action if discrimination is found. The CAO's decision will involve reviewing the entire file, including the investigation report, letter of findings, and, if a hearing was held, the hearing record and recommended decision of the administrative law judge. The decision shall be made within 60 days of receipt of the complaint file or the hearing record.

One commenter objected to the requirement in subparagraph (1)(1) that the CAO explain specifically a decision to reject or modify the ALJ's proposed findings, arguing that it would inappropriately limit the CAO's consideration of the issues. We have adopted the suggestion and eliminated the requirement.

In response to recommendations from the Department's CAO and the Drug Enforcement Administration's ALJ, some changes have been made in the compliance procedures. Among the changes are a new requirement that the ALJ provide findings to all parties, not just the CAO, an added provision for filing exceptions to an ALJ's recommended decision, a delineation of the authorities of the ALJ, and a clarification of the responsibility for supervising compliance with the final agency decision between the Responsible Official and the CAO.

The Department also received some comments on the appropriateness of providing for an appeal by either the complainant or respondent. Some commenters objected to allowing a respondent to obtain an administrative appeal because it could delay remedying discrimination. On the other hand, an impartial adjudicatory mechanism would require that opportunity is provided for both sides to appeal. For this reason, the Department finds it necessary and appropriate for both complainant and respondent to have the right to an administrative appeal.

PART 40—STANDARDS FOR INMATE GRIEVANCE PROCEDURES

Subpart A—Minimum Standards for Inmate Grievance Procedures

Sec.

- 40.1 Definitions.
- 40.2 Adoption of procedures.
- 40.3 Communication of procedures.
- 40.4 Accessibility.
- 40.5 Applicability.

Department of Justice

§ 40.4

- 40.6 Remedies.
- 40.7 Operation and decision.
- 40.8 Emergency procedure.
- 40.9 Reprisals.
- 40.10 Records—nature; confidentiality.

Subpart B—Procedures for Obtaining Certification of a Grievance Procedure

- 40.11 Submissions by applicant.
- 40.12 Notice of intent to apply for certification.
- 40.13 Review by the Attorney General.
- 40.14 Conditional certification.
- 40.15 Full certification.
- 40.16 Denial of certification.
- 40.17 Reapplication after denial of certification.
- 40.18 Suspension of certification.
- 40.19 Withdrawal of certification.
- 40.20 Contemplated change in certified procedure.
- 40.21 Notification of court.
- 40.22 Significance of certification.

AUTHORITY: 42 U.S.C. 1997e.

SOURCE: Order No. 957-81, 46 FR 48186, Oct. 1, 1981, unless otherwise noted.

Subpart A—Minimum Standards for Inmate Grievance Procedures

§ 40.1 Definitions.

For the purposes of this part—

(a) *Act* means the Civil Rights of Institutionalized Persons Act, Public Law 96-247, 94 Stat. 349 (42 U.S.C. 1997).

(b) *Applicant* means a state or political subdivision of a state that submits to the Attorney General a request for certification of a grievance procedure.

(c) *Attorney General* means the Attorney General of the United States or the Attorney General's designees.

(d) *Grievance* means a written complaint by an inmate on the inmate's own behalf regarding a policy applicable within an institution, a condition in an institution, an action involving an inmate of an institution, or an incident occurring within an institution. The term "grievance" does not include a complaint relating to a parole decision.

(e) *Inmate* means an individual confined in an institution for adults, who has been convicted of a crime.

(f) *Institution* means a jail, prison, or other correctional facility, or pretrial detention facility that houses adult inmates and is owned, operated, or managed by or provides services on behalf

of a State or political subdivision of a State.

(g) *State* means a State of the United States, the District of Columbia, the commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

(h) *Substantial compliance* means that there is no omission of any essential part from compliance, that any omission consists only of an unimportant defect or omission, and that there has been a firm effort to comply fully with the standards.

§ 40.2 Adoption of procedures.

Each applicant seeking certification of its grievance procedure for purposes of the Act shall adopt a written grievance procedure. Inmates and employees shall be afforded an advisory role in the formulation and implementation of a grievance procedure adopted after the effective date of these regulations, and shall be afforded an advisory role in reviewing the compliance with the standards set forth herein of a grievance procedure adopted prior to the effective date of these regulations.

§ 40.3 Communication of procedures.

The written grievance procedure shall be readily available to all employees and inmates of the institution. Additionally, each inmate and employee shall, upon arrival at the institution, receive written notification and an oral explanation of the procedure, including the opportunity to have questions regarding the procedure answered orally. The written procedure shall be available in any language spoken by a significant portion of the institution's population, and appropriate provisions shall be made for those not speaking those languages, as well as for the impaired and the handicapped.

§ 40.4 Accessibility.

Each inmate shall be entitled to invoke the grievance procedure regardless of any disciplinary, classification, or other administrative or legislative decision to which the inmate may be subject. The institution shall ensure that the procedure is accessible to impaired and handicapped inmates.

§ 40.5

28 CFR Ch. I (7–1–14 Edition)

§ 40.5 Applicability.

The grievance procedure shall be applicable to a broad range of complaints and shall state specifically the types of complaints covered and excluded. At a minimum, the grievance procedure shall permit complaints by inmates regarding policies and conditions within the jurisdiction of the institution or the correctional agency that affect them personally, as well as actions by employees and inmates, and incidents occurring within the institution that affect them personally. The grievance procedure shall not be used as a disciplinary procedure.

§ 40.6 Remedies.

The grievance procedure shall afford a successful grievant a meaningful remedy. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary.

§ 40.7 Operation and decision.

(a) *Initiation.* The institution may require an inmate to attempt informal resolution before the inmate files a grievance under this procedure. The procedure for initiating a grievance shall be simple and include the use of a standard form. Necessary materials shall be freely available to all inmates and assistance shall be readily available for inmates who cannot complete the forms themselves. Forms shall not demand unnecessary technical compliance with formal structure or detail, but shall encourage a simple and straightforward statement of the inmate's grievance.

(b) *Inmate and employee participation.* The institution shall provide for an advisory role for employees and inmates in the operation of the grievance system. In-person hearings and committees consisting of either inmates or employees or both are not required by this paragraph, but they are permitted so long as no inmate participates in the resolution of any other inmate's grievance over the objection of the grievant.

(c) *Investigation and consideration.* No inmate or employee who appears to be involved in the matter shall participate in any capacity in the resolution of the grievance.

(d) *Reasoned, written responses.* Each grievance shall be answered in writing at each level of decision and review. The response shall state the reasons for the decision reached and shall include a statement that the inmate is entitled to further review, if such is available, and shall contain simple directions for obtaining such review.

(e) *Fixed time limits.* Responses shall be made within fixed time limits at each level of decision. Time limits may vary between institutions, but expeditious processing of grievances at each level of decision is essential to prevent grievance from becoming moot. Unless the grievant has been notified of an extension of time for a response, expiration of a time limit at any stage of the process shall entitle the grievant to move to the next stage of the process. In all instances grievances must be processed from initiation to final disposition within 180 days, inclusive of any extensions.

(f) *Review.* The grievant shall be entitled to review by a person or other entity, not under the institution's supervision or control, of the disposition of all grievances, including alleged reprisals by an employee against an inmate. A request for review shall be allowed automatically without interference by administrators or employees of the institution and such review shall be conducted without influence or interference by administrators or employees of the institution.

[Order No. 957–81, 46 FR 48186, Oct. 1, 1981, as amended by Order No. 1618–92, 57 FR 38773, Aug. 27, 1992; Order No. 1955–95, 60 FR 13902, Mar. 15, 1995]

§ 40.8 Emergency procedure.

The grievance procedure shall contain special provision for responding to grievances of an emergency nature. Emergency grievances shall be defined, at a minimum, as matters regarding which disposition according to the regular time limits would subject the inmate to a substantial risk of personal injury, or cause other serious and irreparable harm to the inmate. Emergency grievances shall be forwarded immediately, without substantive review, to the level at which corrective action can be taken. The procedure for resolving emergency grievances shall

Department of Justice

§ 40.11

provide for expedited responses at every level of decision. The emergency procedure shall also include review by a person or entity not under the supervision or control of the institution.

§ 40.9 Reprisals.

The grievance procedure shall prohibit reprisals. “Reprisal” means any action or threat of action against anyone for the good faith use of or good faith participation in the grievance procedure. The written procedure shall include assurance that good faith use of or good faith participation in the grievance mechanism will not result in formal or informal reprisal. An inmate shall be entitled to pursue through the grievance procedure a complaint that a reprisal occurred.

§ 40.10 Records—nature; confidentiality.

(a) *Nature.* Records regarding the filing and disposition of grievances shall be collected and maintained systematically by the institution. Such records shall be preserved for at least three years following final disposition of the grievance. At a minimum, such records shall include aggregate information regarding the numbers, types and dispositions of grievances, as well as individual records of the date of and the reasons for each disposition at each stage of the procedure.

(b) *Confidentiality.* Records regarding the participation of an individual in the grievance proceedings shall be considered confidential and shall be handled under the same procedures used to protect other confidential case records. Consistent with ensuring confidentiality, staff who are participating in the disposition of a grievance shall have access to records essential to the resolution of the grievance.

Subpart B—Procedures for Obtaining Certification of a Grievance Procedure

§ 40.11 Submissions by applicant.

(a) *Written statement.* An application for certification of a grievance procedure under the Act shall be submitted to the Office of the Attorney General, U.S. Department of Justice, Main Justice Building, Washington, DC 20530,

and shall include a written statement describing the grievance procedure, a brief description of the institution or institutions covered by the procedure, and accompanying plans for or evidence of implementation in each institution.

(b) *Evidence of compliance with established standards.* An applicant seeking certification of a grievance procedure as being in substantial compliance with the standards promulgated herein should submit evidence of compliance with those standards, including the following information:

(1) *Instructional materials.* A copy of the instructional materials for inmates and employees regarding use of the grievance procedure together with a description of the manner in which such materials are distributed, a description of the oral explanation of the grievance procedure, including the circumstances under which it is delivered, and a description of the training, if any, provided to employees and inmates in the skills necessary to operate the grievance procedure.

(2) *Form.* A copy of the form used by inmates to initiate a grievance and to obtain review of the disposition of a grievance.

(3) *Information regarding past compliance.* For a grievance procedure that has operated for more than one year at the time of the application, the applicant shall submit information regarding the number and types of grievances filed over the preceding year, the disposition of the grievances with sample responses from each level of decision, the remedies granted, evidence of compliance with time limits at each level of decision, and a description of the role of inmates and employees in the formulation, implementation, and operation of the grievance procedure.

(4) *Plan for collecting information.* For a grievance procedure that has operated for less than one year at the time of the application, the applicant shall submit a plan for collecting the information described in paragraph (b)(3) of this section.

(5) *Assurance of confidentiality.* A description of the steps taken to ensure the confidentiality of records of individual use of or participation in the grievance procedure.

§ 40.12

(6) *Evaluation.* A description of the plans for periodic evaluation of the grievance procedure, including identification of the group, individuals or individual who will conduct the evaluation and identification of the person or entity not under the control of supervision of the institution who will review the evaluation, together with two copies of the most recent evaluation, if one has been performed.

(c) *Fair and effective procedures.* The Attorney General shall also certify a grievance procedure under the Act, even if the procedure is not in substantial compliance with the standards promulgated herein, if the Attorney General determines that the procedure is otherwise fair and effective for the consideration and disposition of grievances filed by inmates. If a grievance procedure is not in substantial compliance with all standards herein, the applicant shall identify the aspects in which the procedure is in substantial compliance and those in which it is not, describe the other relevant features of the procedure, and explain why the procedure is otherwise fair and effective.

[Order No. 1955-95, 60 FR 13903, Mar. 15, 1995]

§ 40.12 Notice of intent to apply for certification.

The applicant shall post notice of its intent to request certification in prominent places in each institution to be covered by the procedure and shall provide similar written notice to the U.S. District Court(s) having jurisdiction over each institution to be covered by the procedure. The notices shall invite comments regarding the grievance procedure and direct them to the Attorney General.

§ 40.13 Review by the Attorney General.

The Attorney General shall review and respond to each application as promptly as the circumstances, including the need for independent investigation and consideration of the comments of agencies, and interested groups and persons, permit.

§ 40.14 Conditional certification.

If, in the judgment of the Attorney General, a grievance procedure that has been in existence less than one

28 CFR Ch. I (7-1-14 Edition)

year is at the time of application in substantial compliance with the standards promulgated herein or is otherwise fair and effective, the Attorney General shall grant conditional certification for one year or until the applicant satisfies the requirements of § 40.15, whichever period is shorter.

[Order No. 1955-95, 60 FR 13903, Mar. 15, 1995]

§ 40.15 Full certification.

If, in the judgment of the Attorney General, a grievance procedure that has been in existence longer than one year at the time of application is in substantial compliance with the standards promulgated herein or is otherwise fair and effective, the Attorney General shall grant full certification. Such certification shall remain in effect unless and until the Attorney General finds reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards or is no longer fair and effective, and so notifies the applicant in writing.

[Order No. 1955-95, 60 FR 13903, Mar. 15, 1995]

§ 40.16 Denial of certification.

If the Attorney General finds that the grievance procedure is not in substantial compliance with the standards promulgated herein or is no longer fair and effective, the Attorney General shall deny certification and inform the applicant in writing of the area or areas in which the grievance procedure or the application is deemed inadequate.

[Order No. 1955-95, 60 FR 13903, Mar. 15, 1995]

§ 40.17 Reapplication after denial of certification.

An applicant denied certification may resubmit an application for certification at any time after the inadequacy in the application or the grievance procedure is corrected.

§ 40.18 Suspension of certification.

(a) *Reasonable belief of non-compliance.* If the Attorney General has reasonable grounds to believe that a previously certified grievance procedure may no longer be in substantial compliance with the minimum standards or may

Department of Justice

§ 40.21

no longer be fair and effective, the Attorney General shall suspend certification. The suspension shall continue until such time as the deficiency is corrected, in which case certification shall be reinstated, or until the Attorney General determines that substantial compliance no longer exists or that the procedure is no longer fair and effective, in which case, except as provided in paragraph (b) of this section, the Attorney General shall withdraw certification pursuant to § 40.19 of this part.

(b) *Defect may be readily remedied; good faith effort.* If the Attorney General determines that a grievance procedure is no longer in substantial compliance with the minimum standards or is no longer fair and effective, but has reason to believe that the defect may be readily corrected and that good faith efforts are underway to correct it, the Attorney General may suspend certification until the grievance procedure returns to compliance with the minimum standards or is otherwise fair and effective.

(c) *Recertification after suspension pursuant to paragraph (a) of this section.* The Attorney General shall reinstate the certification of an applicant whose certification was suspended pursuant to paragraph (a) of this section upon a demonstration in writing by the applicant that the specific deficiency on which the suspension was based has been corrected or that the information that caused the Attorney General to suspend certification was erroneous.

(d) *Recertification after suspension pursuant to paragraph (b) of this section.* The Attorney General shall reinstate the certification of an applicant whose certification has been suspended pursuant to paragraph (b) of this section upon a demonstration in writing that the deficiency on which the suspension was based has been corrected.

(e) *Notification in writing of suspension or reinstatement.* The Attorney General shall notify an applicant in writing that certification has been suspended or reinstated and state the reasons for the action.

[Order No. 957-81, 46 FR 48186, Oct. 1, 1981, as amended by Order No. 1955-95, 60 FR 13903, Mar. 15, 1995]

§ 40.19 Withdrawal of certification.

(a) *Finding of non-compliance.* If the Attorney General finds that a grievance procedure is no longer in substantial compliance with the minimum standards or is no longer otherwise fair and effective, the Attorney General shall withdraw certification, unless the Attorney General concludes that suspension of certification under § 40.18(b) of this part is appropriate.

(b) *Notification in writing of withdrawal of certification.* The Attorney General shall notify an applicant in writing that certification has been withdrawn and state the reasons for the action.

(c) *Recertification after withdrawal.* An applicant whose certification has been withdrawn and who wishes to receive recertification shall submit a new application for certification.

[Order No. 957-81, 46 FR 48186, Oct. 1, 1981, as amended by Order No. 1955-95, 60 FR 13903, Mar. 15, 1995]

§ 40.20 Contemplated change in certified procedure.

A proposed change in a certified procedure must be submitted to the Attorney General thirty days in advance of its proposed effective date. The Attorney General shall review such proposed change and notify the applicant in writing before the effective date of the proposed change if such change will result in suspension or withdrawal of the certification of the grievance procedure.

§ 40.21 Notification of court.

The Attorney General shall notify in writing the Chief Judges of the U.S. Court of Appeals and of the U.S. District Court(s) within whose jurisdiction the applicant is located of the certification, suspension of certification, withdrawal of certification and recertification of the applicant's grievance procedure. The Attorney General shall also notify the court of the certification status of any grievance procedure at the request of the court or any party in an action by an adult inmate pursuant to 42 U.S.C. 1983.

§ 40.22

§ 40.22 Significance of certification.

Certification of a grievance procedure by the Attorney General shall signify only that on the basis of the information submitted, the Attorney General believes the grievance procedure is in substantial compliance with the minimum standards or is otherwise fair and effective. Certification shall not indicate approval of the use or application of the grievance procedure in a particular case.

[Order No. 1955-95, 60 FR 13904, Mar. 15, 1995]

PART 41—IMPLEMENTATION OF EXECUTIVE ORDER 12250, NON-DISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS

Subpart A—Federal Agency Responsibilities

Sec.

- 41.1 Purpose.
- 41.2 Application.
- 41.3 Definitions.
- 41.4 Issuance of agency regulations.
- 41.5 Enforcement.
- 41.6 Interagency cooperation.
- 41.7 Coordination with sections 502 and 503.

Subpart B—Standards for Determining Who Are Handicapped Persons

- 41.31 Handicapped person.
- 41.32 Qualified handicapped person.

Subpart C—Guidelines for Determining Discriminatory Practices

GENERAL

- 41.51 General prohibitions against discrimination.

EMPLOYMENT

- 41.52 General prohibitions against employment discrimination.
- 41.53 Reasonable accommodation.
- 41.54 Employment criteria.
- 41.55 Preemployment inquiries.

PROGRAM ACCESSIBILITY

- 41.56 General requirement concerning program accessibility.
- 41.57 Existing facilities.
- 41.58 New construction.

APPENDIX A TO PART 41—LEADERSHIP AND COORDINATION OF NONDISCRIMINATION LAWS

AUTHORITY: Executive Order 12250, 45 FR 72995; sec. 504, Rehabilitation Act of 1973,

28 CFR Ch. I (7-1-14 Edition)

Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706).

SOURCE: 43 FR 2132, Jan. 13, 1978, unless otherwise noted. Redesignated at 46 FR 40686, 40687, Aug. 11, 1981.

EFFECTIVE DATE NOTE: At 46 FR 40687, Aug. 11, 1981, the application of part 41 with respect to mass transportation was suspended until further notice.

Subpart A—Federal Agency Responsibilities

§ 41.1 Purpose.

The purpose of this part is to implement Executive Order 12250, which requires the Department of Justice to coordinate the implementation of section 504 of the Rehabilitation Act of 1973.

[43 FR 2132, Jan. 13, 1978. Redesignated and amended at 46 FR 40686, 40687, Aug. 11, 1981]

§ 41.2 Application.

This part applies to each Federal department and agency that is empowered to extend Federal financial assistance.

§ 41.3 Definitions.

As used in this regulation, the term:

(a) *Executive Order* means Executive Order 12250, titled “Leadership and Coordination of Nondiscrimination Laws,” issued November 2, 1980.

(b) *Section 504* means section 504 of the Rehabilitation Act of 1973, Public Law 93-112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93-516, 29 U.S.C. 794.

(c) *Agency* means a Federal department or agency that is empowered to extend financial assistance.

(d) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(e) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other